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FEDERAL ELECTION
COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION
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FEDERAL ELECTION
COMMISSION

In the Matter of)
MUR 6434) CASE CLOSURE UNDER THE
INDIANA DEMOCRATIC PARTY) ENFORCEMENT PRIORITY
SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring criteria to allocate its resources and decide which cases to pursue. These criteria include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both with respect to the type of activity and the amount in violation, (2) the apparent impact the alleged violation may have had on the electoral process, (3) the legal complexity of issues raised in the case, (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended ("Act"), and (5) development of the law with respect to certain subject matters. It is the Commission's policy that pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to dismiss certain cases or, or in certain cases where the response sufficiently rebuts the allegations, to make no reason to believe findings. For the reasons set forth below, this Office recommends that the Commission make no reason to believe findings in MUR 6434.

In this matter, complainant Ray Wolff, media coordinator of Vogel for Congress, the campaign committee of Libertarian candidate Mark Vogel,¹ alleges that the Indiana Democratic Party ("IDP") violated the Act and Commission regulations by distributing up to 20,000 mailers that appeared to have been authorized by the Vogel campaign. According

¹ Mr. Vogel was an unsuccessful candidate from Indiana's Second Congressional District.

1 to the complainant, not only were the IDP mailers not authorized by the campaign, but they
2 allegedly misrepresented Mr. Vogel's positions on a variety of campaign issues. Therefore,
3 the complainant concludes that the IDP's fliers violated the Act and Commission
4 regulations because they failed to include disclaimers stating that they were not authorized
5 by the Vogel campaign. Appended to the complaint are several copies of the mailer, the
6 text of which reads: "VETERAN MARK VOGEL. THE TRUE CONSERVATIVE FOR
7 CONGRESS," and, among other statements, urges "ON TUESDAY, NOV. 2 SUPPORT
8 THE TRUE CONSERVATIVE. VOTE MARK VOGEL FOR CONGRESS." At the
9 bottom of the mailer is the following URL: "www.Vogel4Congress.com," which appears
10 to be the Vogel campaign's website.²

11 In response, the IDP contends that a disclaimer stating that the Vogel campaign had
12 not authorized the mailers was unnecessary because the IDP mailers qualified as "exempt
13 activity," as set forth in 11 C.F.R. §§ 100.147(d) and 110.11(e). Specifically, the IDP states
14 that the mailers, which were public communications, included the disclaimer required by
15 11 C.F.R. § 110.11(e): "Paid for by the Indiana Democratic Party," which is set off from
16 the surrounding dark background in an enclosed white box, *see* 11 C.F.R. §§ 110.11(c)(1)
17 and (2). The IDP's permanent street address is printed underneath the statement and box,
18 as required by 11 C.F.R. § 110.11(b)(3). Additionally, the IDP maintains that the mailing
19 was made on behalf of Representative Joe Donnelly, the Democratic nominee for Congress
20 from Indiana's Second Congressional District. Moreover, the IDP states that the mailers
21 were distributed by party volunteers and, thus, qualified as "exempt party activity."

² The Vogel for Congress Committee also posted an internet story about their complaint, at <http://vogel4congress.com/?p=256>.

1 The IDP further states that, as an “exempt party activity,” the disclaimers on the
2 mailers are not required to state whether the communication was authorized by a candidate.
3 11 C.F.R. § 110.11(e). In addition, the IDP states that materials distributed “in connection
4 with volunteer activities” are exempt from the definition of “contribution” and
5 “expenditure,” *see* 2 U.S.C. §§ 431(8)(B)(ix) and 431(9)(B)(viii); *see also* 11 C.F.R.
6 §§ 100.87 and 100.147.

7 In response to the complainant’s argument that the campaign mailers, which urge
8 “true conservatives” to vote for Libertarian candidate Mark Vogel, might reasonably, but
9 inaccurately, lead readers to believe that the Vogel campaign had authorized them, the IDP
10 instead characterizes the mailers as “information pieces about Mark Vogel.” Specifically,
11 the IDP cites to Advisory Opinion 2008-06 (Democratic Party of Virginia), which provides
12 that, “the content of campaign materials is not restricted under [the volunteer activity]
13 exemption; indeed, the application of this exemption is almost entirely contingent upon *who*
14 [emphasis in original] distributes the material, not what those materials say.”

15 Central to the IDP’s response is the scope of the volunteer activity exemption. To
16 qualify for this exemption, the distributed materials must be, *inter alia*, distributed in
17 connection with volunteer activities and made on behalf of any nominee of a state party.
18 *See* 11 C.F.R. § 100.147. The Commission has looked at various factors when determining
19 whether volunteer activity is sufficient to qualify for the exemption, including whether the
20 volunteers sorted and bundled the mailers, stamped the mailers with the return address and
21 bulk mail indicia, affixed labels, and delivered the mailers to the post office. In its
22 response, the IDP asserts that the mailings included substantial volunteer involvement that
23 was sufficient to qualify as exempt activity: specifically, the volunteers sorted, bundled,

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1 and stacked the mails into trays that were sorted by zip code. Also, declarations signed
2 under penalty of perjury by IDP employees Cameron Radford and Rohan Patel, assert that
3 the mailing involved the use of volunteers to assist in its production, and that the volunteers
4 had sought to transport the mailers to the mail house, but were prohibited from doing so for
5 "insurance and legal reasons."

6 Finally, the IDP's response asserts that commercial mailing lists were not used in
7 preparing the mailers, noting that the complainant failed to provide information to the
8 contrary. It also asserts that the mailers were paid for with federal funds exclusively, but
9 not with funds designated for a particular candidate or with funds received from the
10 national committee. Appended to the IDP's response is an invoice, dated October 27, 2010,
11 that lists a "balance due" of \$10,751 for "Vogel Mail." This transaction is also reflected on
12 the 2010 Post-General Report of the Indiana Democratic Congressional Victory Committee,
13 which is registered with the Commission, as a \$10,751 disbursement to the "Baughman
14 Company" for "mail production" on October 28, 2010.

15 It appears that the IDP's mailers complied with the Act and Commission
16 regulations. In particular, the response and accompanying materials support the contention
17 that the mailers, which were distributed on behalf of the state party's candidate for
18 Congress in Indiana's Second Congressional District, involved significant volunteer
19 activity. Thus, this Office therefore recommends that the Commission find no reason to
20 believe that the Indiana Democratic Party violated the Federal Election Campaign Act of
21 1971, as amended.

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RECOMMENDATIONS

The Office of General Counsel recommends that the Commission find no reason to believe that the Indiana Democratic Party violated the Federal Election Campaign Act of 1971, as amended, close the file, and approve the appropriate letters.


Christopher Hughey
Acting General Counsel

9/16/11
Date

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